Supreme Court, U.S.
FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-375

IN THE
Supreme Court of the United States
OCTOBER TERM 1987

GEOFFREY MONGE, AS SHERIFF OF SARASOTA COUNTY FLORIDA; MAX FRIMBERGER, AS CAPTAIN OF THE SARASOTA COUNTY JAIL; and THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS,

Petitioners,

Vs.

MICHAEL DENNIS STRAUB,

Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FORTHE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the court of appeals was incorrect when it held that the finding of the district court that the Respondent was indigent were not clearly erroneous.

Whether a pretrial detainee or inmate is entitled to access to legal materials if the government does not provide legal assistance.

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RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THEUNITED STATES COURT OF APPEALS FORTHE ELEVENTH CIRCUIT

MICHAEL DENNIS STRAUB hereby responds to the petition for writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioners' App. 1a-17a) is reported at 815 F. 2d 1467. The opinion of the district court petitioners' App. 18a-26a) is not reported.

STATEMENT

1. On March 5, 1982, the Respondent, MICHAEL DENNIS STRAUB, was arrested for the armed robbery of a North Port bank. He remained in Sarasota County Jail until September of 1982 when he was transferred to Florida State Prison. During the course of the next three months, the Respondent made several unsuccessful attempts to obtain assistance of the Public Defender whom he believed had been appointed to his case. Straub, Tr. 7-10.

Plaintiff's Exhibit 12B. Concurrently, he made several requests to use a law library and to have legal materials brought to him by members of his family to begin working on his own defense. Straub, Tr. 14, 16, 17, 27.

Likewise, the Respondent met with at least two private attorneys in an effort to secure representation in the criminal matter. Straub, Tr. 110-114. Testimony at trial revealed that the cost to acquire private representation was beyond the Respondent's means. Straub, Tr. 110.[1] Prior to his first meeting with appointed counsel, the Respondent made several requests to use the law library in the criminal case. Several months after Respondent's incarceration, Respondent was served with a summons for the civil forfeiture of his automobile, naming him, as well as the automobile. At the time of the Respondent's incarceration, there was no library in the jail, thus requiring transportation to the County Law Library outside the jail, but nearby. 1.Tr. 26. Although there was no concern that Straub was a security risk, jail officials continually refused permission for his use of a law library on the basis of a written jail policy conditioning any access to law library on the acquisition of a court order. Specifically, the jail handbook stated, "*Law Library*, access to the law library will be granted upon receipt of a court order." No other instruction was provided. 1 Tr. 24, 26; Plaintiff's Exhibit 1.

The Respondent, in an attempt to comply with the policy, submitted several motions to the court seeking permission to use the law library and *his Black's Law Dictionary.* (Plaintiff's Exhibits 7, 13, 15.) He was never told of the outcome of these motions and was not permitted to visit the law library. 1 Tr. 22; Straub, Tr. 6, 15, 26-27. Also, the Petitioners did not permit Respondent to receive any copies of cases and statutes that family members brought to the jail. Straub Tr.17;1Tr.4. His attempts to gain any legal assistance failed. Straub Tr.62-64;1Tr 93-95.

Testimony at trial supported the finding of the district court that the Respondent was indigent at the time he was incarcerated at Sarasota County Jail. Testimony from the Public Defender revealed that both he and the state court judge were aware of the

[1] At this point in time, the Respondent was not aware of a civil forfeiture proceeding brought against him to forfeit his automobile. The testimony of the Respondent also revealed that he had been informed that the State would not be seizing his automoblie. (Straub, Tr. 140, 148.)

Respondent's full financial circumstances at the time he was appointed counsel. 1 Tr. 117. Likewise, unrebutted testimony revealed that the Respondent made several attempts to seek private counsel, but the costs were prohibitive. Straub, Tr. 110. Lastly, the confusion surrounding the civil forfeiture matter brought before his criminal trial, and naming him as a party, made it difficult for the Respondent to distinguish the two cases pending against him and assess his legal needs. Straub, Tr. 140, 148.

Petitioners' representation of the Respondent's financial situation is incorrect and inconsistent with the evidence at trial. Respondent did not purchase his former wife an automobile while incarcerated in the Sarasota County Jail. Straub, Tr. 98. Petitioners mislead the court by stating that the Respondent saved $3,000 while incarcerated. It should be noted that the evidence at trial revealed that the Respondent accumulated $3,000 during the course of his three year prison sentence, and not during his detention at Sarasota County Jail. Straub, Tr. 97. Evidence was received at trial that the Respondent had no accessible money while detained in the Sarasota County Jail. *Id.*

2. The present action arises from consolidated cases Respondent brought in the United States District Court for the Middle District of Florida against Petitioners. Respondent claimed damages under 42 U.S.C. §1983 for violation of his right of access to courts pursuant to this court's decision in *Bounds v. Smith*, 430 U.S. 816 (1977). After trial, the district court concluded the Respondent had been denied his right of access to the Courts in his civil forfeiture proceeding.

Additionally, the district court upheld the state circuit court's finding that the Respondent was indigent. Indeed, the district court heard testimony that the Respondent used all his money for support payments of his children and wife. Straub, Tr. 98. Based on the testimony and evidence at trial, the district court held that Respondent was indigent during the period he was incarcerated in Sarasota Country Jail. Regarding the Petitioners' emphasis on income, the district court stated, "[d]efense counsel even went so far as to make the rather cynical assertion that Straub was contributing too much money to the support of his wife and children, money which could have been used by him to hire counsel." Petitioners' App. at 24a.

The district court further noted that income was only one factor in determining the indigence of a detainee and that the state court judge considered the Respondent's family situation and obligation when making its determination. *Id.*

The district court also noted in its opinion that when it removed the Respondent's *informa pauperis* status, the court did not make the kind of indigency determination about the Respondent that the state court judge was obligated to make in its criminal matter. Despite the Petitioners' representation that the district court's determination of indigence was based "solely" on the fact that he was appointed Public Defender, the district court considered the factors set out in § 27.52(2), Florida Statutes (1985). *Id.* [2]

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court. Petitioners' App. at 4a-5a. Despite the Petitioners' characterization that there was "clear and uncontroverted evidence" that the Respondent was non-indigent, the Court of Appeals reaffirmed that Respondent was indigent. The Eleventh Circuit noted that the district court, after a full hearing, determined that the Respondent was indigent at the time of his incarceration in the Sarasota County Jail. Petitioners' App. at 4a.

The United States Court of Appeals for the Eleventh Circuit also held that the financial status of the detainee has no bearing on the constitutional mandate of meaningful access to the courts as set out

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[2] Petitioners recognize that income is only one factor in an indigency determination, but they misrepresent the law. Under *Fla. Stat.* §27.52(2) (c), the court *must* consider the factors set out in the Statute:

> (c)The court shall also consider the additional circumstances in determining insolvency:
>
> 1. The probable expense and burden of defending the case;
> 2. The ownership of, or equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property by the defendant; and
> 3. The amount of debts owed by defendant or debts that might be incurred by the defendant because of illness or other misfortunes within his family.

Notwithstanding the assertions made by the petitioner, Florida law strictly requires this insolvency analysis and sole reliance of the affidavit of insolvency is error. *DiBartolomeo v. State*, 450 So. 2d 925 (Fla. 4th D.C.A. 1984); *Enrique v. State*, 408 So. 2d 635 (Fla. 3d D.C.A. 1981).

by this Court and *Bounds v. Smith*, 430 U.S. 817 (1977). The Court recognized that the *Bounds* decision required that the State shoulder affirmative obligations to assure *all* prisoners meaningful access to the courts. Petitioners' App. at 5a. (Emphasis in Opinion.)

The Eleventh Circuit held that this right of access applies to civil forfeiture cases, thus, affirming the decision in the district court awarding damages in the amount of $3,000 plus attorneys' fees and costs.

Judge Hill specially concurred in the opinion of the Eleventh Circuit. Although Judge Hill agreed that the Respondent was in fact indigent and the right of access extends to civil forfeiture matters, Judge Hill took issue with the majority's decision to extend this right to a non-indigent detainee. Petitioners' App. at 9a. Notably, Judge Hill stated that his comments were not to be interpreted as how he would rule if the case with a proper factual predicate would be before him. *Id.* at 17a.

REASONS FOR DENYING THE PETITION

Both the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit held that: (1) the Respondent was indigent at the time of his incarceration at Sarasota County Jail, and (2) regardless of his financial situation, the Respondent was entitled to legal assistance by someone trained in the law or legal materials to help him defend or prosecute civil matters. Although the Petitioners repeatedly admonish both courts below regarding their findings of fact, they admit that in order to address the constitutional issue, this Court must initially address the factual issue that they concede is "unworthy of this Court's review." Petitioners' brief at 13 -14.

1. FACTUAL FINDINGS MUST BE CLEARLY ERRONEOUS BEFORE AN APPELLATE COURT CAN REVERSE THEM.

It has been well established by this Court that findings of fact will not be disturbed unless determined to be clearly erroneous and without support in the record. *Roemer v. Board of Public Works of Maryland*, 416 U.S. 736 (1976). This Court asserted that "[i]t is not

our place, however, to reappraise the evidence unless it plainly fails to support the findings of the trier of facts." *Id.* at 758. Moreover, this Court refused to second-guess the district court in certain matters even though its own decision may have been different. *Id.* Like the present case, the Petitioners in *Roemer* were requesting this Court to set aside certain findings of fact based on selected excerpts from the record that they believed supported their position. Finding support in the record for the lower court's findings, this Court refused to alter the judgement of the district court recognizing that the trier of fact is in a better position to evaluate the evidence than an appellate court with only a bare record to review. *Id.*

Despite Petitioners' repeated mischaracterization of the Respondent as a "non-indigent," three courts have held otherwise; the Florida Circuit Court, The United States District Court and the Eleventh Circuit. Indeed, the record is replete with evidence that the Respondent was indigent at the time of his incarceration at Sarasota County Jail. Evidence revealed that any money or income he was receiving went to his wife and children. Straub, Tr. 97-98, 129-135. Evidence established that the Respondent made several attempts to employ counsel but could not afford the representation. Straub, Tr. 110-114. Evidence further showed that the Respondent attempted to gain assistance through the Gulf Coast Legal Aid Service, but it declined since the organization did not consider his civil forfeiture as a priority case in its office. Straub, Tr. 22, (Plaintiff's Exhibit 16A, 16B, 16D). Respondent had no available money while in the custody of the Sarasota County Jail. Straub, Tr. 97.

2. THE DECISION BELOW FOLLOWED THIS COURT'S MANDATE IN BOUNDS V. SMITH.

The Petitioners have misinterpreted both the holdings of the Eleventh Circuit below and *Bounds v. Smith*, 430 U.S. 817 (1977). Petitioners *incorrectly* state in their brief that the Eleventh Circuit held "as a matter of constitutional right, all state prisoners -- regardless of wealth or adequacy of representation -- are entitled to access to law libraries and other materials in all litigation which those

inmates are involved." Petitioners' brief at 7. In actuality, the Eleventh Circuit's decision simply applied this Court's holding in *Bounds v. Smith*, 430 U.S. 817 (1977). The law of the Eleventh Circuit is that the government is obligated to provide all prisoners "with adequate legal libraries *or* adequate assistance from persons trained in the law." Petitioners' App. 7a, citing *Bounds*, 430 U.S. at 828. Consequently, the Petitioners entire argument is fallacious stemming from their incorrect reading of the decision below.

The Petitioners misstate the holding of this Court in *Bounds v. Smith*, 430 U.S. 817 (1977), by asserting that this Court mandated that "*indigent* prisoners have *minimally adequate* access to courts." Petitioners' brief at 9 (emphasis added). Rather, the holding in *Bounds* and recognized in the Eleventh Circuit's decision below was "[o]ur decisions have consistently required States to shoulder affirmative obligations to assure *all* prisoners' *meaningful* access to the courts." *Bounds*, 430 U.S. at 824 (cited with emphasis in the Eleventh Circuit Opinion, Petitioners' App. at 5a) The Eleventh Circuit recognized that indigent inmates are usually the ones affected, however, this Court did not intend to restrict this constitutional right of access, protecting only those within an undefined financial class.[3]

Contrary to the Petitioners' contentions, the Eleventh Circuit *did not* broaden the application of *Bounds* inasmuch as the inmate or detainee's wealth was never a factor in the equation, or considered by this Court. This Court has required that access be "adequate, effective and meaningful." *Bounds*, 430 U.S. at 822. That, in and of itself, is the only limiting factor. To suggest that the Eleventh Circuit's opinion leaves local governments virtually defenseless is patently erroneous. The opinion below merely confirms that *Bounds v. Smith* requires that prison authorities not avoid their responsibility of ensuring that inmates have either a law library or

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[3] Indeed, the district court recognized this distinction as an "administrative disaster area" that would require meaningful access to the courts to make an indigency determination, in order to gain meaningful access to the courts to prosecute and defend claims. Petitioners App. 25a. The district court also noted from the evidence at trial that the Respondent's financial status played no part in the Petitioners' access policies while the Respondent was incarcerated. Petitioners' App. at 24a; 1 Tr. 26-27, 129. The courts below were no doubt concerned that jail officials would attempt to second-guess or override the indigency determination by the court, as in this case.

adequate legal assistance to enable the prisoners or pretrial detainees to prepare meaningful legal papers, thus giving them constitutional access to the courts.

In the case *sub judice*, the district court ruled and the court of appeals affirmed, that the Petitioners' policy with respect to access did not pass constitutional muster. The record shows that Respondent was not permitted to use the law library, have anyone bring him legal materials (or newspapers for that matter), or offered legal assistance by anyone. Straub, Tr. 20-22, 29-30; 1 Tr. 20, 29-30. To the extent that local governments are now defenseless as to legitimate claims when in violation of *Bounds*, the decision below accomplished that task. However, this is not to say that the local governments will have to allow the inmate to choose his form of assistance. The holdings of both this Court in *Bounds*, and the Eleventh Circuit's opinion below charges local governments with the responsibility to provide some form of "meaningful" access, either through legal assistance, or the opportunity to allow inmates to at least help themselves. Neither decision requires a library that is complete with every legal treatise or reporter available as Petitioners suggest. Rather, legal materials must be supplied that would permit the inmate or pretrial detainee to have meaningful and effective access to courts. Neither opinion mandates a lawyer of the inmate or detainee's choice. Rather, both decisions require some form of legal assistance by someone trained in the law in the event that the inmate or pretrial detainee is not permitted to receive legal materials or permitted to use a law library.

3. The Decision Below Comports with Every Decision in Every Circuit.

Despite Petitioners' argument to the contrary, virtually every case decided by the United States Court of Appeals for the Fifth Circuit, subsequent to *Bounds*, has held that *all* prisoners or pretrial detainees, regardless of their financial worth, are entitled to either a law library or legal assistance. *Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986); *Morrow v. Harwell*, 768 F.2d 619 (8th Cir. 1985); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Cruz v. Hauck*, 627 F. 2d 710 (5th Cir. 1980); *Corpus v. Estelle*, 551 F.2d 68 (5th Cir. 1977).

For example, in *Corpus v. Estelle*, 551 F.2d 68 (5th Cir. 1977), the court affirmed the judgment of the district court finding that the Texas Department of Corrections did not allow the prisoners access to the courts. Likewise, the court held that reasonable access to courts must include access in general civil legal matters including but not limited to divorce in small civil claims. *Id.* at 70.

The limited precedential significance of *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976),[4] subsequent to *Bounds* comes into clear focus upon review of the Fifth Circuit's decision in *Morrow v. Harwell*, 768 F.2d 619 (5th Cir. 1985). In *Morrow*, the Fifth Circuit recognized that access to courts mandated by *Bounds* includes indigent and non-indigent inmates. As in the present case, a significant number of inmates were pretrial detainees. The court in *Morrow* recognized that meaningful access to the courts must be given by either providing a law library or assistance from someone trained in the law. In *Morrow*, the assistance came from university law students. The court noted that "[t]he students can assist prisoners only by providing copies of forms, cases, and other written legal materials. The copies are made for inmates at their request at a rate of ten cents per page, with free copies for indigents." *Id.* at 622.[5] The Fifth circuit applied the guidelines established in Bounds in the context of a civil case, to include both indigent and non-indigent inmates and detainees.

The United States Court of Appeals for the Eleventh Circuit correctly rejected "the fact" that the right of access is "inextricably tied to a concern with providing 'reasonably adequate' legal service to indigent inmates." Petitioners' brief at 9.[6] Both the district court and the Court of Appeals below recognized that the law of the Fifth Circuit is that the financial status of the inmate plays no part in the access to courts' analysis. *Cruz v. Hauck*, 627 F. 2d 710 (5th Cir.

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[4]Notably, *Wilson v. Zarhadnick*, 534 F. 2d 55 (5th Cir. 1976), has *never* been cited as legal authority for the proposition that only indigent inmates are entitled to the protection under *Bounds*.

1980). Addressing access in a civil case, the court in *Cruz* held:

> If *all* inmates do not have such access, the court should devise a plan ensuring adequate entry to the courts, either by reasonable access to attorneys *or* by a reasonable access to legal materials, *or* by any other means a district court may devise.

Id. at 719 (emphasis in original).

The Eleventh Circuit's opinion below is in accord with every circuit in the United States. In *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978), *cert. denied*, 482 U.S. 911 (1979), the Fourth Circuit addressed *Bounds v. Smith* in the context of a criminal matter. Recognizing that *Bounds v. Smith* mandated that the State provide the defendant with access to courts through either legal materials or someone trained in the law, the *Chatman* court held that the defendant's sixth amendment right to appointed counsel satisfies the constitutional requirement. The *Chatman* court noted that if the State exercises one of the options mandated in *Bounds*, the prisoner is not entitled to choose the alternative. Likewise, the Eleventh Circuit below held that the State must exercise at least one of the options to ensure access. Petitioners' App. at 6a. See also, *Hooks v.Wainwright*, 775 F.2d 1433 (11th Cir. 1985)*(en banc)*. In this case, both courts below held that the Petitioners neither offered legal assistance to the Respondent, nor access to any legal materials in any form. Petitioners' App. at 2a-3a. The record shows that the Respondent in this case tried several

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5 The court in *Morrow* held that this was insufficient legal assistance given the limited amount of materials that were provided to the inmates and pretrial detainees. Although the system in *Morrow* gave greater access to the inmates than the present case, it did not pass constitutional muster of "adequate effective and meaningful" access to courts. *Morrow*, 768 F.2d at 623.

6 This characterization of this Court's opinion is *Bounds* is misleading. This court stated in *Bounds* that prisoners must have a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825. In order to accomplish this requirement, inmate access to the courts must be "adequate, effective and meaningful." *Id.* at 822.

avenues to gain access to the courts; evidence at trial revealed he would have accepted any form of access he could have achieved. Straub Tr. 14-16, 27-29, 62-64, 129-134, 141.

To the same affect is *United States v. Wilson*, 690 F. 2d 1267 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983). In *Wilson*, the Ninth Circuit opined that if the State offers legal assistance through the appointment of an attorney, an inmate is not free to reject that method and insist on another avenues of access of his or her choosing. *Id.* at 1271. Likewise, in *United States*, ex rel. *George v. Lane*, 718 F.2d 226 (7th Cir. 1983), the Seventh Circuit held that an appointed counsel is sufficient to satisfy *Bounds*, even if rejected by the inmate. *Id.* at 231. Nearly all of the cases cited by the Petitioners' involved access to the courts in criminal matters accomplished by the sixth amendment. Since there is no sixth amendment right to counsel in a civil forfeiture case, the decisions cited by the Petitioners have limited applicability.

In its opinion below, the Eleventh Circuit held that in the context of the civil forfeiture matter, the Respondent was denied legal assistance or legal materials and consequently received no meaningful access. Petitioners' App. at 2a. Since he had no sixth amendment right to counsel, and no assistance was offered, the county was under an obligation to furnish legal materials or allow use of an adequate law library.

The necessity of meaningful access to the courts in most civil matters has been well established. Indeed, in *Corpus v. Estelle*, 551 F. 2d 68 (5th Cir. 1977), the court held that the right of access to the courts must include access in general civil legal matters including but not limited to divorce and small civil claims.[7] Recently, in *Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986), the Fifth Circuit reiterated this application of *Bounds*. *Id.* at 311. This Court has long recognized the right of access applies to civil claims. *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 28 S. Ct. 34 (1907); *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971).

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[7] The Eleventh Circuit adopted Fifth Circuit law as it existed on September 30, 1981, as binding precedent. *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981) *(en banc)*.

The Petitioners overstate the effect of the Eleventh Circuit's decision below. Although they prophesize that the existence of the right to access "will almost certainly encourage some inmates to become more litigious," the very purpose of *Bounds* was to assist inmates in filing legal documents and avoid frivolous cases. *Bounds*, 43 U.S. at 831-832. Indeed, this Court stated:

> Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that their grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly.

Id. at 831-832. The Petitioners now seek to undermine and severely restrict this Court's decision in *Bounds v. Smith, supra* by asserting financial status at the determinative factor.

The petition to review the decision below should be denied as it is a logical application of previous decisions by this Court in a fact-specific context. The Constitution requires inmates or pretrial detainees to be provided legal materials through an adequate law library, or legal assistance by someone trained in the law.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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